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No. 98-194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BONNIE A. O'NEILL, on behalf of herself and the estate of Kerryn L. O'Neill, and EDMUND J. O'NEILL,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF

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The objections that the Opposition offers to a grant of certiorari are not substantial.

1. By failing to identify any language in the text of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, that supports its reading of *Feres v. United States*, 340 U.S. 135 (1950), the government effectively concedes that the *Feres* doctrine has no statutory basis. The government also does not dispute that in *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955), and *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), the Court abandoned the only rationale of the *Feres* decision itself that purported to be based on the text of the FTCA. Thus the government

entirely misplaces its reliance (Opp. at 13) on cases holding that *stare decisis* applies with particular force where statutory interpretation is involved. Those cases cannot apply where, as here, there is no statutory text being interpreted. The *Feres* doctrine is (and has been at least since *Indian Towing* and *Rayonier*) a Court-devised, extra-statutory restriction on the FTCA remedy created by Congress. This Court simply lacks the power to impose such a restriction.

The government also fails to suggest a response to other substantial issues raised in the Petition that this Court has never addressed. (*See* Pet. at 12-15). These issues were not presented in *United States v. Shearer*, 473 U.S. 52 (1985), or in *United States v. Johnson*, 481 U.S. 681, 692 (1987) ("We have not been asked by respondent here to overrule *Feres*") (Scalia, J., dissenting). Moreover, despite the government's contrary contention (Opp. 10-12), it is clear that the courts of appeals are in conflict and disarray in their current attempts to apply the doctrine. The government is silent, for example, regarding the current conflict over the Second Circuit's new rationale for *Feres*. *Compare Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995) (after canvassing other circuits' law and finding it unsatisfactory, announcing a new "military employment" rationale), *with Skees v. United States*, 107 F.3d 421, 425, n.3 (6th Cir. 1997) (declining to follow *Taber*). Each of these issues warrants review.

2. In its Opposition the government heavily relies on *Shearer* and yet misconstrues that decision. In *Shearer*, the Court implicitly recognized that it and the lower courts had some difficulty interpreting and applying *Feres*, partly due to the lengthy history of variation of rationales for the doctrine (*see* Pet. at 6-9). Seeking again to address this difficulty, the Court stated that certain rationales were no longer sustainable, *id.* at 58 n.4, and emphasized that the doctrine "cannot be reduced to a few bright-line rules". *Id.* at 57. In re-

rationalizing the *Feres* test, the Court plainly did not hold that all suits brought by or on behalf of servicemembers were automatically barred. Although the government does not directly challenge these parts of *Shearer*, it purports to find "decisions of command" in such personal activities as attending school and getting engaged (Opp. at 7 n.3), thus finding incidence to service in virtually any aspect of a servicemember's life and effectively reading out of existence the flexible test announced in *Shearer*. [1]

Having grossly extended the breadth of its reading of *Shearer*, the government still must distort the nature of Petitioners' claim to try to force this case into the framework of that overly broad reading. (Opp. at 6-9). Petitioners do not challenge any "'complex, subtle and professional decisions as to the composition, training, . . . and control of a military force'" nor any "decision[s] of command". *Shearer*, 473 U.S. at 57-58, 59. Instead, Petitioners seek to hold the government liable for the negligent failure of one of its civilian psychologists to follow a non-discretionary Navy regulation. Where, as here, an alleged failure to follow established military rules and procedures forms the basis of an FTCA claim, there is no threat of an inquiry into sensitive military issues. *Dreier v. United States*, 106 F.3d 844, 850 (9th Cir. 1997) (citing *Johnson v. United States*, 704 F.2d 1431, 1440 (9th Cir. 1983)); *Elliott v. United States*, 877 F. Supp. 1569

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[1] The government misstates a crucial fact from *Shearer*, claiming that the decisions at issue were not made by the commanding officers of the decedent (Shearer). (Opp. at 8). Indeed, it appears that Shearer and Heard served together – and therefore had the same commanding officers – because the Court noted that "[R]espondent allege[d] that *Private Shearer's superiors* in the Army 'negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard'". 473 U.S. at 58 (emphasis added). In any event, the negligence alleged here does not involve any act or omission on the part of the commanding officers of Kerryn O'Neill, or, indeed, of Ensign Smith, but rather the failure of Dr. Wallace, the Navy civilian psychologist, to review Smith's psychological test results.

(M.D. Ga. 1992), *aff'd by equally divided en banc court*, 37 F.3d 617 (11th Cir. 1994).

Moreover, the government fails to respond to Petitioners' contention that specific provisions in the FTCA satisfactorily address the Court's concern about litigation over sensitive military matters. (Pet. at 17). In particular, the government apparently cannot explain how the military command issues identified in *Shearer* would not be entirely protected by the discretionary function exception of § 2680(a), and thus do not need additional protection from *Feres* doctrine.

3. Despite Petitioners' discussion of and reliance on *Brooks v. United States*, 337 U.S. 49 (1949), the government fails even to cite that decision. Indeed, the government's argument is in direct conflict with that binding precedent. The government recounts the history of the personal relationship between Kerryn O'Neill and Ensign Smith, from their initial meeting at the Naval Academy to their engagement, eventual break-up and "unhappy end". (Opp. at 7 n.3). In a vain attempt to make this tragic sequence of private events appear "in the course of activity incident to service" (*id.*, citing *Feres*), the government is constrained to suggest that even this most private of conduct is bound up in "command decisions". *Id.* But in *Brooks* this Court rejected just such a broad assertion from the government: "[W]e are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service *except in the sense that all human events depend upon what has already transpired.*" 337 U.S. at 52 (emphasis added). Indeed, as Chief Judge Becker noted in his dissenting opinion below, "here, where decedent's injuries were wholly unrelated to her military service, we should follow the Supreme Court's direction in *Brooks*" and allow the suit to go forward. (Pet. App. at 11a.).

It is therefore clear that both parties' positions necessarily draw into question one or more of this Court's precedents. Petitioners obviously urge the Court to overrule the *Feres* doctrine. In opposition, the government advances a position that is so inconsistent with *Brooks* that the government does not even address *Brooks* despite the reliance on that decision by Petitioners and Chief Judge Becker below. By avoiding a discussion of *Brooks*, the government effectively signals the Court that acceptance of the government's position is inconsistent with that decision.

If the government had openly stated in its Opposition that its position could not be reconciled with the holding in *Brooks*, that would have greatly added weight to the request for certiorari. But whether the government admits it or not, its position, flagged here by its inability or at least unwillingness even to mention *Brooks*, is that the *Brooks* opinion cannot be reconciled with its view of the proper scope of the *Feres* doctrine. Petitioners submit that the government's elision as strongly supports a grant of certiorari as a frank recognition of this inconsistency. This is true even if the government could be heard to argue that *Brooks* has already been weakened by later decisions of this Court. *Cf. Johnson*, 481 U.S. at 698. *See Hohn v. United States*, 118 S. Ct. 1969, 1978 (1998) ("*Our decisions are binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing validity.*") (emphasis in original) (citation omitted).

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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